Speaking of Language and Law: Conversations on the Work of Peter Tiersma

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Reviewed by John Gibbons

Introduction

This book is unusual in its structure, in that it consists of key extracts from Tiersma’s work, followed by comments from a range of 33 major figures in forensic linguistics. This very structure conveys the great respect in which Tiersma is held. The choice of the extracts also illustrates the extensive range of Tiersma’s work. The book then is in part a tribute to Tiersma’s monumental contribution.

It is more than this, however, because many of the comments break new ground, and therefore the collection constitutes an important contribution to the field. There are no less than 49 sections to the book, so a review such as this cannot possibly summarise each individual contribution. Therefore, my comments will be limited to an overview. A listing of the contributions is available at the Oxford University Press website. There are quite frequent typographical errors. The col-
lection is divided into six thematic parts, which are often further divided into sub-topics, followed by a bibliography of Tiersma’s work.

**Part I. ‘Legal Language and its History’**

It is typical of Tiersma that the extracts from his work are of pristine clarity, with the occasional element of sly wit and even mischief. They inspire considerable thought and discussion in the commentaries. One particular concern raised by Tiersma is the difference between legal language and other types of formal written language. Schauer’s comment highlights the misleading phenomenon of ordinary English words used with legal meanings. Ravitch uses philosophical hermeneutics to grapple with Tiersma’s suggestion of a ‘Wiki’ drafting process which leaves traces so that interpretation can look at the drafter’s intent and not just use the interpreter’s world view and knowledge. Finegan and Stein cleverly underline Tiersma’s differences between legal language and non-legal language. I would like to have seen another comment based on register analysis (see Biber and Conrad 2009). My sociolinguistic side also wonders what would happen if everyday conversation were used as the baseline.

**Part II. ‘The Language of Contracts and Wills’**

The extracts from Tiersma address two topics. First, the mode shift in wills over time, from handwriting, to print, to audio/video and digital; Tiersma makes a range of insightful comments, and makes practical suggestions. There are no comments on this topic.

The second section looks at a speech act approach to the language of contracts, in particular what language or action constitutes acceptance of a contract. DeLong shows how Tiersma’s speech act approach could improve judges’ reasoning and decisions. However, Lipshaw provides an interesting challenge, noting that ‘parties might have manifest mutual assent by their conduct rather than by offer and acceptance’ (problematising the speech act model of the process) (p. 90).

**Part III. ‘Speech and Action’**

In the first section of Part III, ‘The Meanings of Silence in Law’, the first extract from Tiersma looks at the language of silence, particularly whether silence can indicate admission or consent – generally the law does not accept this. Tiersma discusses the felicity conditions for silence to be taken as consent or admission. Since Tiersma often treats non-verbal communication as silence (for instance signalling by lights, gestures and actions), a comment by a semiotician would have been useful. Other helpful possibilities might have come from Conversa-
tional Analysis (Hutchby and Wooffitt 2008) or the Sinclair and Coulthard (1992) paradigm, on Initiation-Response-Feedback/Evaluation sequences. There are interesting comments by Mertz, Coulthard and Liao.

The next extract is a typically Tiersma topic – the symbolic destruction in the burning of flags, draft cards and crosses, and the general symbolic communication of destroying buildings. This is not commented on.

In the second section of Part III, ‘Consenting’, the discussion of the meaning of silence is then extended in the next extract concerning consent in sexual assault cases. In this brilliant section, Tiersma suggests that it should be man’s responsibility to obtain consent, rather than the woman’s role to withhold it, since consent may be obtained involuntarily by pressure. He also discusses the well-attested patriarchal ideologies at play in courtroom discourse on rape. The comments on this section are particularly valuable, as Ehrlich and Grant and Spaul expand on Tiersma’s work and tease apart issues such as involuntary consent being not consent but compliance. Matoesian too adds telling comments on patriarchal ideologies. Stygall takes the notion of consent into other areas such as contracts.

The next section is titled ‘Defaming’. Tiersma gives his usual sharp insights here, including a critical emphasis on the intent of the author, and not the perlocutionary effect (this might possibly be handled under the legal umbrella of ‘malice’, which is part of the common law definition in some jurisdictions). Tiersma equates ‘defamation’ with ‘accusation’, and Kredens, in a thoughtful contribution expanding on perlocutionary force, points out that, in an increasingly fragmented socio-cultural milieu, one person’s ‘accusation’ might be another’s ‘praise’.

Part IV. ‘Interpreting Laws’

In Part IV, Tiersma expounds his theory of ‘textualization’. He discusses once more mode shift, through writing to print to electronic form, but concludes that the more stable written form will continue to play a role. He notes that electronic texts can show the traces of its process of generation, and thereby make more explicit the lawgivers’ intent. He proposes that legislation contain a ‘statement of purpose’ to narrow the range of possible interpretations and constructions. However, Kaplan’s commentary points out that textualists such as Judge Scalia have stated explicitly that such statement of purpose should be ignored, and only the operative part be considered.

In the next extract, Tiersma shows in a typically clear way how US judges tend to base their judgments on short texts (he says they are almost ‘sound bites’), while UK judges often attempt to decode the underlying concepts, and write longer judgments on that basis. Solan makes an interesting extension of this notion of textualisation, showing how judges recycle these sound bites as bases for further judgments, thereby in effect rewriting the law: ‘it is hard to escape
the conclusion that judges act as much as lawgivers as the law interpreters they profess to be’ (p. 201). There is also an interesting discussion by Stevenson of the manner in which the hierarchical organisation of legislation/information by topic may impact on the legal system.

Part V. ‘Language and Criminal Justice’

In the first section ‘Crimes of Language’, the specific language crime discussed by Tiersma is perjury, and he discusses the infamous Bronson case, where the accused did not lie directly, but by implication. Ainsworth’s apposite comment clarifies the thinking behind the Supreme Court’s puzzling decision to find Bronson not guilty of perjury.

In section 2, ‘Criminal Justice and Everyday Speech’, Tiersma discusses the legal interpretation of everyday speech, revealing how the courts’ insistence on the letter of the law can frustrate its intent. Tiersma suggests that improvements could emerge if courts performed careful pragma-linguistic analyses, including the felicity conditions for speech acts.

Leo’s contribution points out that the courts’ literalism is selective, since they expect ‘the speech style of criminal suspects to be direct and assertive, while [they] allow the speech style of police to be indirect and implied. As a result, courts maintain that criminal defendants are held to a higher linguistic standard than police, thereby using selective linguistic modes of interpretation to favor the state over the accused’ (p. 256).

Part VI. ‘Jury Instructions’

This is a highly significant part of this book, because of the real world impact of jury instructions that do not communicate adequately with jurors. Tiersma was an important force in the struggle to make jury instructions more comprehensible, and this is touchingly acknowledged at the beginning of the official California Civil Jury Instructions: http://www.courts.ca.gov/partners/documents/caci-2016-complete-edition.pdf.

His clear dispassionate approach is all the more effective as he reveals some shocking consequences of miscommunication – including death in jurisdictions that still use the death penalty. He notes that plain language alone is necessary but not sufficient to enhance juror understanding. The commentators expand in a range of ways on possible means of improving communication. Dumas suggests the use of narrative explanations, Heffer in an eloquent piece suggests a more responsive and interactive approach to juror questions, and Marder the provision of the instructions in writing: in sum a more interactive and multimodal approach to communication with jurors.
Conclusion

In this collection the commentators’ task is daunting – Tiersma’s work is of such quality that it is difficult to make positive contributions, and since the volume is in honour of Peter Tiersma, criticism is uncomfortable. In consequence, there is some variation in the quality of the contributions from the stellar cast of commentators. Most are valuable, some less so. But this is to quibble. Anybody who is not familiar with Tiersma’s work has a goldmine in this book, and most of the comments are excellent contributions. This book is a must-read for anyone interested in forensic linguistics. Vale Peter Tiersma – you are missed.

References

